

Council on Efficient Government

Summary

This legislation is designed to create a council on efficient government whose purpose is to ensure that each state agency focuses on its core mission and delivers goods and services effectively and efficiently by leveraging resources and contracting with private sector vendors if those vendors can more effectively and efficiently provide goods and services and reduce the cost of government. Additionally, the council is to evaluate for feasibility, cost effectiveness, and efficiency business cases to be outsourced before a state agency proceeds with any outsourcing of goods or services.

Model Legislation

Section 1. {Title.}

This Act shall be known and may be cited as the Council on Efficient Government Act.

Section 2. {Council on Efficient Government; members; terms; vacancies.}

(A) The Council on Efficient Government is established consisting of the following members:

(1) The chief executive or administrative officer of a state agency who is appointed by the Governor.

(2) Two members who are engaged in private enterprise and who are appointed by the Governor.

(3) Two members who are engaged in private enterprise and who are appointed by the President of the Senate.

(4) Two members who are engaged in private enterprise and who are appointed by the Speaker of the House of Representatives.

(B) The terms of appointment to the council are for two years unless the chief executive or administrative officer of a state agency ceases to hold office. The Governor shall appoint a replacement member for the remainder of the unexpired term.

(C) A member of the Council who is engaged in private enterprise is not eligible to receive compensation but is eligible for reimbursement of expenses, pursuant to state statute.

(D) A member of the Council may not participate in a council review of a business case to outsource if the state agency is conducting the proposed outsourcing or, in the case of a member engaged in private enterprise, if the member has a business relationship with an entity that is involved or potentially could be involved in the proposed outsourcing.

(E) A member of the Council who is engaged in private enterprise may not delegate the membership to a designee.

(F) A quorum shall consist of at least three members of the council.

(G) Any vacancy on the Council shall be filled in the same manner as the original appointment, and any member appointed to fill a vacancy occurring for a reason other than the expiration of a term serves only for the unexpired term of the member's predecessor.

(H) The Council shall select a chairperson from among its members.

Section 3. {Powers and duties of the council; annual report.}

(A) The Council shall:

(1) Review whether or not a good or service provided by a state agency could be privatized to provide the same type and quality of good or service that would result in cost savings or best value. The Council may hold public hearings as part of its evaluation process and shall report its recommendations to the Governor, the President of the Senate and the Speaker of the House of Representatives.

(2) Review privatization of a good or service at the request of a state agency or a private enterprise.

(3) Review issues concerning agency competition with one or more private enterprises to determine ways to eliminate any unfair competition with a private enterprise.

(4) Recommend privatization to a state agency if a proposed privatization is demonstrated to provide a more cost efficient or more effective manner of providing a good or service.

(5) Comply with Sections 4 and 5 of this bill.

(6) Employ a standard process for reviewing business cases to outsource.

(7) Review and evaluate business cases to outsource as requested by the Governor or the state agency head whose agency is proposing to outsource.

(8) No later than thirty days before a state agency's issuance of a solicitation of ten million dollars or more, provide to the state agency conducting the procurement, the Governor, the President of the Senate and the Speaker of the House of Representatives, an advisory report for each business case reviewed and evaluated by the Council. The report must contain all versions of the business case, an evaluation of the business case, any relevant recommendations and sufficient information to assist the state agency proposing to outsource in determining whether the business case to outsource should be included with the legislative budget request.

(9) Recommend and implement standard processes for state agency and council review and evaluate state agency business cases to outsource, including templates for use by state agencies in submitting business cases to the council.

(10) Recommend standards, processes and guidelines for use by state agencies in developing business cases to outsource.

(11) Incorporate any lessons learned from outsourcing services and activities into council standards, procedures and guidelines, as appropriate, and identify and disseminate to agencies information regarding best practices in outsourcing efforts.

(12) Develop guidelines for assisting state employees whose jobs are eliminated as a result of outsourcing.

(13) Receive complaints of violations of this article.

(14) Transmit complaints received under this section to the state agency alleged to be in violation.

(15) Hold public hearings on complaints and determine whether the agency is in violation of this article.

(16) Issue a written report of its findings to the complainant within ninety days after receiving the state agency's response.

(17) Transmit to the Governor, the President of the Senate and the Speaker of the House of Representatives a complete report of each meeting, including recommendations to correct violations of prohibitions on competition with private enterprise and findings on necessary exceptions to the prohibitions.

(18) Solicit petitions of interest from private sector service providers as the council considers appropriate. The council may evaluate and review the petitions and may hold public hearings as part of the evaluation process. The Council may recommend some or all of the petitions to the Governor's office for further review pursuant to state statute. A person does not have a cause of action based on the failure of the council to consider a petition of interest or make a recommendation.

(B) The Council may evaluate and review all state agency exemptions and exemptions to the restrictions on competition with private enterprise in this article and may determine that any function or functions of state agency are in violation of this article. The council shall report its findings and recommendations to the Governor, the President of the Senate and the Speaker of the House of Representatives.

(C) The council shall prepare an annual report on:

(1) Recommendations on innovative methods of delivering government services that would improve the efficiency, effectiveness or competition in the delivery of government services, including enterprise-wide proposals.

(2) Outsourcing efforts of each state agency, including the number of outsourcing business cases and solicitations, the number and dollar value of outsourcing contracts, descriptions of performance results as applicable, any contract violations or project slippages and the status of extensions, renewals and amendments of outsourcing contracts.

(3) Information about the council's activities.

(4) The status of the inventory created under Section 4 of this bill.

(D) The Council shall submit the annual report prescribed by Subsection C of this section to the Governor, the President of the Senate and the Speaker of the House of Representatives no later than January 15 immediately following the calendar year for which the report is made. The council shall provide an oral report to the Joint Legislative Budget Committee and the Governor's Office of Strategic Planning and Budgeting when the legislature is not in session.

(E) The Auditor General shall employ an adequate number of staff who collectively possess significant expertise and experience as required to carry out the responsibilities of this article.

(F) Each state agency shall submit to the council all information, documents and other materials required by the council pursuant to this article.

(G) At the request of the Council and on approval of the Joint Legislative Audit Committee, the Auditor General shall provide performance audit and other required information relating to state agency budgets and functions. The Auditor General may assist in the development and review of the agency inventory of commercial activities prescribed in Section 4.

(H) In addition to filing a copy of recommendations for privatization with an agency head, the council shall file a copy of its recommendations for privatization with the Governor's office, the Joint Legislative Budget Committee and the Governor's Office of Strategic Planning and Budgeting for submission to the relevant legislative appropriation subcommittee.

(I) The council may appoint advisory groups to conduct studies, research or analyses and make reports and recommendations with respect to a matter within the jurisdiction of the council. At least one member of the council shall serve on each advisory group.

(J) Subject to Section 5, subsection B, this article does not preclude a state agency from privatizing the provision of a good or service independent of the council.

(K) Except as provided by section state statute, any aggrieved person may elect to directly seek judicial relief.

Section 4. {Commercial activities inventory and review.}

(A) On or before a date selected by the legislature, the council shall create an inventory of activities of state agencies to classify whether each activity or elements of the activity are:

- (1) A commercial activity that can be obtained in whole or in part from a private enterprise.
- (2) An inherently governmental activity.

(B) The Council shall update the inventory created under this section at least every two years.

(C) The Council shall make the inventory available to the public through electronic means.

(D) State agencies shall cooperate with inventory requests made by the Council.

Section 5. {Business cases to outsource; review and analysis; requirements.}

(A) A proposal to outsource having a projected cost of more than ten million dollars in any fiscal year shall require:

- (1) An initial business case analysis conducted by the state agency and submitted to the Council, the Governor, the President of the Senate and the Speaker of the House of Representatives at least sixty days before a solicitation is issued. The Council shall evaluate the business case analysis and submit an advisory report to the state agency, the Governor, the President of the Senate and the Speaker of the House of Representatives when the advisory report is completed, but at least thirty days before the agency issues the solicitation.
- (2) A final business case analysis conducted by the state agency and submitted after the conclusion of any negotiations, at least thirty days before execution of a contract, to the council, the Governor, the President of the Senate and the Speaker of the House of Representatives.

(B) A proposal to outsource having a projected cost of at least one million dollars but not more than ten million dollars in any fiscal year shall require:

(1) An initial business case analysis conducted by the state agency and submission of the business case, at least thirty days before issuing a solicitation, to the Council, the Governor, the President of the Senate and the Speaker of the House of Representatives.

(2) A final business case analysis conducted by the state agency and submitted after the conclusion of any negotiations, at least thirty days before execution of a contract, to the Council, the Governor, the President of the Senate and the Speaker of the House of Representatives.

(C) A business case to outsource having a projected cost of less than one million dollars in any fiscal year shall require a final business case analysis conducted by the state agency after the conclusion of any negotiations and provided to the council at least thirty days before execution of a contract. The Council shall provide the business cases in its annual report to the President of the Senate and the Speaker of the House of Representatives.

(D) For any proposed outsourcing, the state agency shall develop a business case that justifies the proposal to outsource. The business case is not subject to challenge or protest. The business case must include:

(1) A detailed description of the service or activity for which the outsourcing is proposed.

(2) A description and analysis of the state agency's current performance based on existing performance measures if the state agency is currently performing the service or activity.

(3) The goals desired to be achieved through the proposed outsourcing and the rationale for the goals.

(4) A citation to the existing or proposed legal authority for outsourcing the service or activity.

(5) A description of available options for achieving the goals. If state employees are currently performing the service or activity, at least one option involving maintaining state provision of the service or activity shall be included.

(6) An analysis of the advantages and disadvantages of each option, including, at a minimum, potential performance improvements and risks.

(7) A description of the current market for the contractual services that are under consideration for outsourcing.

(8) A cost benefit analysis documenting the direct and indirect specific baseline costs, savings and qualitative and quantitative benefits involved in or resulting from the implementation of the recommended option or options. The analysis must specify the schedule that, at a minimum, must be adhered to in order to achieve the estimated savings. All elements of cost must be clearly identified in the cost benefit analysis, described in the business case and supported by applicable records and reports. The state agency head shall attest that based on the data and information underlying the business case and to the best of the state agency head's knowledge all projected costs, savings and benefits are valid and achievable. For the purposes of this paragraph:

(a) "Cost" means the reasonable, relevant and verifiable cost, which may include elements such as personnel, materials and supplies, services, equipment, capital depreciation, rent, maintenance and repairs, utilities, insurance, personnel travel, overhead and interim and final payments. The appropriate elements shall depend on the nature of the specific initiative.

(b) "Savings" means the difference between the direct and indirect actual annual baseline costs compared to the projected annual cost for the contracted functions or responsibilities in any succeeding state fiscal year during the term of the contract.

(9) A description of differences among current state agency policies and processes and, as appropriate, a discussion of options for or a plan to standardize, consolidate or revise current policies and processes, if any, to reduce the customization of any proposed solution that would otherwise be required.

(10) A description of the specific performance standards that must, at a minimum, be met to ensure adequate performance.

(11) The projected time frame for key events from the beginning of the procurement process through the expiration of a contract.

(12) A plan to ensure compliance with the public records law.

(13) A specific and feasible contingency plan addressing contractor nonperformance and a description of the tasks involved in and costs required for its implementation.

(14) A state agency's transition plan for addressing changes in the number of agency personnel, affected business processes, employee transition issues and communication with affected stakeholders, such as agency clients and the public. The transition plan must contain a reemployment and retraining assistance plan for employees who are not retained by the state agency or employed by the contractor.

(15) A plan for ensuring access by persons with disabilities in compliance with applicable state and federal law.

(16) A description of legislative and budgetary actions necessary to accomplish the proposed outsourcing.

(E) Each contract for a proposed outsourcing pursuant to this section shall include the following:

(1) A scope-of-work provision that clearly specifies each service or deliverable to be provided, including a description of each deliverable or activity that is quantifiable, measurable and verifiable. This provision must include a clause stating that if a particular service or deliverable is inadvertently omitted or not clearly specified but determined to be operationally necessary and verified to have been performed by the agency within the twelve months before the execution of the contract, the service or deliverable will be provided by the contractor through the identified contract amendment process.

(2) A service level agreement provision describing all services to be provided under the terms of the agreement, the state agency's service requirements and performance objectives, specific responsibilities of the state agency and the contractor and the process for amending any portion of the service level agreement. Each service level agreement must contain an exclusivity clause that allows

the state agency to retain the right to perform the service or activity, directly or with another contractor, if service levels are not being achieved.

(3) A provision that identifies all associated costs, specific payment terms and payment schedules, including provisions governing incentives and financial disincentives and criteria governing payment.

(4) A provision that identifies a clear and specific transition plan that will be implemented in order to complete all required activities needed to transfer the service or activity from the state agency to the contractor and operate the service or activity successfully.

(5) A performance standards provision that identifies all required performance standards, which must include at a minimum:

(a) Detailed and measurable acceptance criteria for each deliverable and service to be provided to the state agency under the terms of the contract that document the required performance level.

(b) A method for monitoring and reporting progress in achieving specified performance standards and levels.

(c) The sanctions or disincentives that will be imposed for nonperformance by the contractor or state agency.

(6) A provision that requires the contractor and its subcontractors to maintain adequate accounting records that comply with all applicable federal and state laws and generally accepted accounting principles.

(7) A provision that authorizes the state agency to have access to and audit all records related to the contract and subcontracts, or any responsibilities or functions under the contract and subcontracts, for purposes of legislative oversight and a requirement for audits by a service organization pursuant to professional auditing standards, if appropriate.

(8) A provision that requires the contractor to interview and consider for employment with the contractor each displaced state employee who is interested in such employment.

(9) A contingency plan provision that describes the mechanism for continuing the operation of the service or activity, including transferring the service or activity back to the state agency or successor contractor, if the contractor fails to perform and comply with the performance standards and levels of the contract and the contract is terminated.

(10) A provision that requires the contractor and its subcontractors to comply with public records laws specifically to:

(a) Keep and maintain the public records that ordinarily and necessarily would be required by the state agency in order to perform the service or activity.

(b) Provide the public with access to the public records on the same terms and conditions that the state agency would provide the records.

(c) Ensure that records that are exempt or records that are confidential and exempt are not disclosed except as authorized by law.

(d) Meet all requirements for retaining records and transfer to the state agency, at no cost, all public records in possession of the contractor on termination of the contract and destroy any duplicate public records that are exempt or confidential. All records stored electronically must be provided to the state agency in a format that is compatible with the information technology systems of the state agency.

(11) A provision that addresses ownership of intellectual property. This paragraph does not provide the specific authority needed by a state agency to obtain a copyright or trademark.

(12) If applicable, a provision that allows the state agency to purchase from the contractor, at its depreciated value, assets used by the contractor in the performance of the contract. If assets have not depreciated, the state agency shall retain the right to negotiate to purchase at an agreed on cost.

Section 6. {Council accounting method.}

The council, by rule, shall establish an accounting method that:

(1) Is similar to generally accepted accounting principles used by a private enterprise.

(2) Allows an agency to identify the total actual cost of engaging in a commercial activity in a manner similar to how a private enterprise identifies the total actual cost to the private enterprise, including the following:

(a) Labor expenses, such as compensation and benefits, costs of training, costs of paying overtime, costs of supervising labor or other personnel expenses.

(b) Operating costs, such as vehicle maintenance and repair, marketing, advertising or other sales expenses, office expenses, costs of an accounting operation such as billing, insurance expenses, real estate or equipment costs, debt service costs or a proportionate amount of other overhead or capital expenses, such as vehicle depreciation and depreciation of other fixed assets.

(c) Contract management costs.

(d) Other costs particular to a person supplying the good or service.

(3) Provides a process to estimate the taxes a state agency would pay related to engaging in a commercial activity if the state agency were required to pay federal, state and local taxes to the same extent as a private enterprise engaging in the commercial activity.

Section 7. {Governor; required review of commercial activities.}

Beginning with a fiscal year the legislature designates, the Governor, at least once every two fiscal years, shall select at least three commercial activities that are being performed by a state agency to be examined by the Governor's Office of Strategic Planning and Budgeting.

Section 8. {Duties of the Governor's Office of Strategic Planning and Budgeting.}

(A) The Governor's Office of Strategic Planning and Budgeting shall:

(1) Determine the amount of an appropriation that is no longer needed by an executive branch agency because all or a portion of the agency's provision of a good or service is privatized.

(2) Adjust the Governor's budget recommendations to reflect the amount that is determined under paragraph 1.

(3) Report its findings to the President of the Senate and the Speaker of the House of Representatives.

(B) This section does not prevent the Governor from making a budget recommendation regarding the restoration of a portion of the appropriation to a state agency that is reduced under this section.

Section 9. {Applicability.}

This article does not apply to contracts in support of the planning, development, implementation, operation or maintenance of the road, bridge and public transportation construction program of the Department of Transportation.

Section 10. {Initial terms of members of the Council on Efficient Government.}

Notwithstanding Section 2 of this bill, the initial members of the Council on Efficient Government who are engaged in private enterprise shall assign themselves by lot to terms of one or two years in office. The appointing authority shall make all subsequent appointments as prescribed by statute.

Section 11. {Severability Clause.}

Section 12. {Repealer Clause.}

Section 13. {Effective Date.}

COMPETITIVE CONTRACTING OF PUBLIC SERVICES ACT

Summary

The purpose of the bill is to require that each government entity (the state and any public bodies organized under the laws of the state) develop a competitive environment for the production of goods and services. This would be accomplished by an annual "make or buy" analysis requirement (consideration of competitive contraction) based upon a percentage of the government entity's budget. Government entities would also be required to institute a make or buy analysis when presented with a good faith petition by a private company indicating an interest in providing the service under contract to the government entity and for less than the internal cost of operation. In preparation for implementation, government entities would be required to establish a free enterprise participation process.

A make or buy analysis would include the issuance of a request for proposal for the specified good or service, and the award of a contract to the lowest responsive and responsible proposer. The government entity would be required to observe proposal requirements as if it is a private company, submitting sealed proposals and employing true costing provisions (unless it chose not to compete for the good or service). Contracts would be limited to five years, including options, after which time any such service would be subjected to make or buy analysis again. The government entity could issue a new RFP in a shorter period of time. (Examples of this bill are Colorado SB #201, 1989 and Arizona HB #2507, 1990)

Model Legislation

{Title, enacting clause, etc.}

Section 1. {Legislative Declarations.}

The legislature hereby finds and declares that.

1. Protection of taxpayers requires that public services be provided at the lowest possible cost consistent with service and safety standards.
1. Private companies have been used under competitive contracts to provide public services at lower costs and with lower annual cost increases.
1. Decisions on whether a public service should be operated by a public agency or a private company should be made on economic considerations rather than on institutional considerations.
1. Obtaining cost effective public services requires a competitive environment and a mechanism for competitive contracting of such services.

Section 2. {Definitions.}

1. "Attributable fully allocated cost:" means the operating and capital cost of a public service including direct, indirect and allocated minus the cost of any function not to be competitively contracted.
 1. "Government entity:" means includes any of the following: The state, a local government, a special district or any other public body authorized or established under the laws or authority of the state (such as counties, cities, towns, townships, villages, special districts, government enterprises, publicly owned utilities, school districts, transit districts, etc.).
- (C) "Make or buy analysis:" means a periodic analysis in which the costs of internal production of a good or service are compared to the costs of production by outside vendors. The process assumes the comparison of the true costs of public and private production methods that result in comparable public goods or services.

(D) "Public goods and services:" means any product or service produced by a covered government entity under its public authority and any product or service supportive of or ancillary to the functions of the government entity.

Section 3. {Scope of the Act.}

(A) Application: This act shall apply to all departments of state governments and all municipalities, counties, public agencies, publicly controlled districts, and government-owned corporations constituted under the laws of the state (hereinafter referred to as government entities).

(B) Routine make or buy analysis requirement: On an annual basis, each government entity shall perform or buy analysis covering goods or services representing at least five percent of its operating budget. The annual make or buy analysis shall be limited to public goods or services not currently provided through make or buy analysis under this Act.

(C) Petitions of interest: In addition to the routine make or buy analysis requirement above, each government entity shall perform make or buy analysis covering any good or service for which it has received a qualifying petition of interest from a private company (consistent with the process below). No more than one make or buy analysis shall be required for a particular good or service within a one-year period.

(D) Public control of specifications: Each government entity shall retain full control of service quantities, service specifications, standards and any other matter demonstrably related to the delivery of the particular public good or service in a manner consistent with the public interest.

(E) Requirement for speedy compliance: Government entities shall fully comply with this Act as soon as practicable, but shall in any case be in full compliance with its provisions within one year of enactment.

Section 4. {Exclusions.}

The following public goods and services shall not be subject to this act:

- (A) Police
- (B) Regulatory functions
- (C) Public school or public university instruction
- (D) Judicial functions
- (E) Executive (governor) and legislative direct staff.

Section 5. {Free enterprise participation process.}

(A) *Establishment of free enterprise participation process:* Each government entity shall establish a free enterprise participation process, including:

(1) Maintenance of a list of interested proposers, which shall include all organizations that have requested inclusion on such list. The government entity shall advertise for additions to the interested proposers list at least annually.

(2) Distribution to companies on the mailing list of a calendar specifying:

1. requirement)

1. fiscal year).

(3) Government entity appeal process covering petitions of interest and requests for proposals.

(B) *Wide participation to be sought:* The free enterprise participation process shall seek the widest possible participation of interested private companies in the production of public goods and services.

Section 6. {Petitions of Interest.}

(A) *Companies may file petitions of interest:* Private companies interested in producing goods or services for government entities may file petitions of interest subject to the free enterprise participation process of the government entity

(B) *Petition of interest requirements:* Petitions of interest shall include:

1. government entity;
1. the government entity, for a lower cost than the present cost;
1. A description of the company's financial capacity to provide the service;
- A. especially evidenced by identical, similar, or relevant goods or services provided by the company, whether under public sponsorship or not;

(C) *Timely action on petitions of interest:* Within 90 days the government entity shall determine whether there is sufficient reason to believe that the private company has the financial and technical ability to provide the public good or service.

(D) *Findings with respect to petitions of interest:* The government entity shall make one of two findings with respect to the petition of interest:

1. provide the good or service;
1. provide the good or service. The government entity shall state its justification for such a finding.

Note: If the government entity has scheduled an immediate make or buy analysis for substantially the same public good or service specified in the petition of interest, it shall notify the petitioner that such an analysis has been scheduled, without making a finding on the petition.

(E) *Make or buy analysis requirement where petition of interest is certified:* If the government entity certifies the petition, the government entity shall undertake a make or buy analysis with respect to the public good or service specified in the petition, at the first possible opportunity within its schedule adopted under its free enterprise participation process.

Section 7. {Make or Buy Analysis And Contracts.}

Request for proposals requirement: The make or buy analysis shall be performed through the issuance and evaluation of requests for proposals from private companies.

Request for proposal process:

(1) The government entity shall seek the widest reasonable distribution of each request for proposals, and at a minimum shall send each request for proposals to each organization on the interested proposers list and to each additional organization that requests the specific request for proposal.

1. accordance with its general procurement policy.

1. Proposals submission shall be required no sooner than 45 days after the RFP advertisement date.

1. contract.

2. The government entity may submit its own proposal in response to the RFP, subject to the terms and conditions later specified.

(C) Evaluation of proposals:

(1) The government entity shall employ a two-step review process, involving the concurrent submittal of two packages: first, the financial qualifications and technical proposal, and second, the cost proposal.

1. government entity shall determine whether each such submittal represents a responsive and responsible proposal.

1. proposers.

(2) with respect to each request for proposals, the government entity shall award the contract to the private provider or government entity whose responsible and responsive proposal offers the lowest cost.

(D) Limitation on contract length: Any public good or service operated under competitive proposals on the effective date of this Act or thereafter shall be subject a new competitive proposal at least every five years. Renewal options that extend a contract beyond five years shall be prohibited.

- *No reversion to non-competitive operation:* In no case shall a good or service operated under competitive proposal be returned to operation not subject to competitive proposal.
1. A government entity shall not establish or impose any requirement relating to salaries, wages, benefits, or labor union representation, staffing levels, work rules, or other conditions of employment of private contractor employees. All contractors shall comply with applicable federal and state labor laws.
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1. Each government entity shall share capital facilities and equipment available for operation under competitive proposals by private contractors to the maximum extent feasible, subject to supervision of the government entity. Capital facilities and equipment should be denied use by private contractors only if they would similarly be denied to use by the government entity itself if it were awarded the contract.
1. All contract prices shall be competitively determined through a request for proposal. No change in contract payment amount to a private contractor or government entity shall be made except as specified in the contract. Payment changes in a contract shall be limited to indices, escalators, deflators, changes in service level, and other expressly stated or calculable amounts, consistent with the request for proposal and the proposal of the private contractor or government entity awarded the contract.
1. A government entity may execute interim standby competitive contracts with one or more private contractors to provide any good or service on an interim basis in the event that the government entity is required to do so by the public welfare. Any good or service operated under a standby contract shall be subject to competitive proposal within six months of standby contract service award.
 2. *No restrictive agreements:* No government entity shall make or be bound by any contract, agreement, or assurance that restricts its ability to comply with this Act in any respect.

Section 8. {Internal Government Entity Proposals.}

The government entity may compete to provide the public good or service subjected to make or buy analysis by submitting its own proposal, subject to the following conditions:

1. That it submit a sealed proposal before the advertised deadline for such proposals, that the proposal not be altered after that deadline and that the proposal be publicly opened and made public at such deadline.
2. *Fair labor competition:* That any labor provision assumed in the proposal either be specified in currently effective labor contracts or be executed before the proposal deadline in a written and binding agreement between the government entity and the appropriate labor organization.
3. *Objective evaluation:* That it take reasonable steps to ensure an objective and fair evaluation process including prohibition of proposal evaluation participation by personnel or departments that were involved in preparing the government entity's proposal.
4. *Fair cost competition:* That its proposal price be not less than its attributable fully allocated cost for the service, and that its proposal price not be based on part time labor provisions or other less costly labor provisions to a greater percentage than such provisions are employed in comparable positions within the government entity, and that its proposal price be consistent with currently adopted budgets and financial plans.
5. *No restrictive labor agreements:* That it shall make or be bound by no contract, agreement, or assurance which creates or extends any form of obligation for continued employment or employee compensation, except for pension, beyond the contract expiration date under the provisions of the request for proposal for employees assigned to the service.
6. *Equal contract administration:* That it shall be bound by the same terms, conditions, and performance and other standards as would have applied to a private provider awarded the contract under the request for proposal.

(G) *Cost control required:* That its costs shall not at any point during the contract period rise by an amount greater than that specified for the corresponding period in the government entity's proposal. If the government entity's cost performance is not in compliance with this provision, the government entity shall issue a new request for proposal for the good or service within 90 days.

Section 9. {Severability clause}

Section 10. {Repealer clause.}

Section 11. {Effective date.}

PUBLIC-PRIVATE FAIR COMPETITION ACT

Summary

This act prohibits government from engaging in any commercial activity of any goods or services to or for government agencies or for public use which are also offered by private enterprise. It establishes a Private Enterprise Advisory Committee to act in conjunction with the state auditor to review and make determinations concerning state agencies engaged in or proposed to be engaged in activities which unfairly compete with the private sector. It also establishes a system to resolve complaints from the private sector regarding unlawful government activity established in this Act. (An example of this bill is Oregon BB #2778, 1993.)

Model Legislation

{Title, enacting clause, etc}

Section 1.

This Act shall be known and may be cited as the Public-Private Fair Competition Act.

Section 2. {Statement of purpose}

The Legislative Assembly finds and declares that the growth of private enterprise is essential to the health, welfare, and prosperity of this state and that government competes with the private sector when it provides goods and services to the public. It is the intent of the Legislative Assembly and the purpose of this Act to protect economic opportunities for private industry against unfair competition by government agencies and enhance the efficient provision of public goods and services. It is also the intent of the Legislative Assembly that issues and complaints regarding competition between government and the

private sector be addressed by the state auditor, with advise from the Public Enterprise Advisory Committee created by this Act.

Section 3. {Definitions}

(A) "Commercial Activity" means performing services or providing goods which can normally be obtained from private enterprise.

(B) "Committee" means the Private Enterprise Advisory Committee.

(C) "Competitive impact statement" means a cost analysis using uniform accounting standards accepted by private enterprise to determine the total cost of commercial activity. The cost analysis shall include a comparison of impact of commercial activity on state and local tax revenues. The private enterprise cost figures in the cost analysis shall be determined by obtaining one or more bids for performing or providing commercial activity.

(D) "Government agency" means the state, any unit of state government and any local government or other subdivision or district of the state, and shall not be construed to exclude any entity which is not majority owned as private property and which established under the Constitution, statutes, ordinances or any other order or action by any such entity or its officers.

(E) "Private enterprise" means an individual, firm, partnership, joint venture, corporation, association or any other legal entity engaging in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing or advertising of goods or services for profit.

(F) "Uniform accounting standards" means an accounting method which allows government agencies to identify the true and total cost to supply goods and services in the same manner as private enterprise would identify true and total cost, including but not limited to the following:

- (1) Labor expenses, including direct wage and salary costs, training costs, overtime and supervisory overhead;
- (2) Total employee fringe and other personnel expenses;
- (3) Operating costs including vehicle maintenance and repair, marketing, advertising, and other sales expenses, office expenses, billing and insurance expenses;
- (4) Real estate and equipment costs, debt service costs and a proportionate amount of other agency overhead and capital expenses including vehicle depreciation and depreciation of other fixed assets such as buildings and equipment;
- (5) Contract management costs;
- (6) The imputed tax impact of the activity if such entity were required to pay federal state and local taxes; and
- (7) Any other cost particular to the business or industry supplying the goods or services.

(G) "Government agency" means the state, any unit of state government and any local government or other subdivision or district of the state, and shall not be construed to exclude any entity which is not majority owned as private property and which established under the Constitution, statutes, ordinances or any other order or action by any such entity or its officers.

Section 4. (Government activity prohibitions and exceptions)

(A) Except as provided in this act, a government shall not engage in any commercial activity, including, but not limited to, the manufacturing, processing, managing, sale, offering for sale, rental, leasing, delivering, dispensing, distributing, or advertising, in whole or part, of any goods or services to or for government agencies or for public use which are also offered by private enterprise.

(B) Notwithstanding any other provision of law, a government agency is authorized to perform or provide a commercial activity only when:

(1) The activity is authorized by state law.

(2) Use of a private enterprise source would cause unacceptable delay or disruption of an essential program.

(3) The agency can provide or is providing goods or services to government agencies or the public on a continuing basis at a lower cost than if such goods or services were obtained from private enterprise as determined by cost comparison as outlined in the competitive impact statement relating to the specific good or service.

Section 5 (Competitive Impact Statement)

(A) A government agency shall not be required to perform more than one competitive impact statement within one year for the same good or service as specified in a complaint under this act.

Section 6 (Committee governance)

(A) The state auditor in consultation with the Public Enterprise Advisory Committee, shall review and make determinations concerning state statutes, state rules and practices of state agencies relating to activities engaged in or proposed to be engaged in by

government agencies which may be affected by this act and shall enforce the provisions of this act.

(B) The state auditor, in consultation with the committee, shall determine final uniform accounting standards to be used for cost analysis in this Act in at least as strict a form as the definition of uniform accounting standards in this Act.

(C) The state auditor, in consultation with the committee, shall adopt rules:

(1) Necessary to govern the public bidding process by private enterprise.

(2) Establishing procedures for hearing and resolving complaints filed under this Act.

(D) The state auditor shall report activities and determinations made under this Act to the Governor and Legislative Assembly not later than [deadline].

(E) The Private Enterprise Advisory Committee is created in the Department of Insurance and Finance. The committee shall advise the state auditor in the implementation and enforcement of this Act. The committee shall consist of nine unpaid members who shall be appointed as follows:

(1) The Governor, Speaker of the House of Representatives and President of the Senate shall each appoint two members from private enterprise who are business owners or officers.

(2) Two members who shall be chief executive or administrative officers of a government agency and who shall be appointed by the Governor.

(3) One member of the Legislative Assembly who shall be appointed by the Speaker of the House of Representatives.

(4) The chairperson of the committee shall be appointed by the Governor from the members representing private enterprise.

(F) All initial appointments to the committee shall be made no later than January 1 of the year following enactment. Terms of office for all members of the committee shall be two years and members may be reappointed up to an additional four terms. Each member who is a state agency employment shall remain on the committee until the end of the member's term of office, but only so long as the person remains a state agency employee. A vacancy on the committee shall be filled within 60 days of the date the vacancy occurred in the same manner as the original appointment. Any member appointment to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of the term. Each member shall continue in office until a successor is appointed and qualified.

(G) Five members of the committee shall constitute a quorum. No action shall be taken by the committee without the concurrence of at least three members.

(H) The state auditor shall adopt rules necessary to govern proceedings of the committee. Members of the committee shall serve without compensation but shall be entitled to expenses.

Section 7 {Complaints}

(A) Any person who believes that a government agency has engaged in or is proposing to engage in commercial activity in violation of this Act may file a written complaint with the state auditor stating the grounds for the complaint. Upon receipt of the complaint the state auditor shall immediately transmit a copy of the complaint to the head of the government agency which is the subject of the alleged violation and to the committee.

(B) The head of the government agency named in the complaint shall respond to the state auditor in writing within 30 days after receipt of a complaint. The state auditor shall transmit a copy of the response to the committee. The government agency shall either admit or deny the allegations made in the complaint and indicate whether remedial action will be taken.

(C) If a government agency denies the allegations made in the complaint, the government agency shall:

(1) Prepare and submit to the state auditor a competitive impact statement concerning the commercial activity that is the subject of the complaint; and

(2) Prepare a detailed request for proposal which will be widely disseminated within segments of private enterprise which normally engages in the commercial activity that is the subject of the complaint in order to obtain firm bids or proposal for the activity requested. All bidding processes shall be a matter of public record. A reasonable time period shall be given to private enterprise to submit bids or proposals. Bids received from the request for proposal shall be made available upon request of the state auditor. Bids received from request for proposal shall be used in the preparation of the competitive impact statement.

(D) The state auditor shall establish a deadline for submission of the competitive impact statement by the government agency.

(E) The state auditor shall hold a public hearing on the complaint where all parties are afforded an opportunity to present evidence. The hearing shall be held:

(1) Within 30 days after receipt of the agency's response under this section, if the agency admits the allegations in the complain but does not indicate whether remedial action will be taken; or

(2) Within 30 days after the state auditor receives the competitive impact statement prepared under this section.

(F) After considering the competitive impact statement, bids received from private enterprise under this Act and other evidence presented, the state auditor, after consulting with committee, shall determine whether the government agency is in violation of the provisions of this Act. If a government agency is found to be in violation of this Act, the state auditor shall take the necessary steps to terminate the commercial activity.

(G) Within 30 days after the public hearing, the state auditor shall issue a report of its findings to the complainant and the government agency.

(H) If the government agency's commercial activity is to be terminated, the termination shall take place within three months of the state auditor's report or under a schedule set by the state auditor.

(I) The state auditor shall establish by rule fees for filing complaints which will supply the operating funds of the committee. The fee shall not be less than \$2,000 per complaint. In the case where the state auditor finds in favor of the complainant, the government agency shall pay the filing fee, and the complainant shall be reimbursed by the state auditor.

(J) If the government agency fails to comply with the state auditor's order, the state auditor may file an action to restrain and enjoin the government agency from engaging in the activity.

(K) A private enterprise that suffers economic loss as a result of a government agency violating this Act has a cause of action for injunctive relief or damages, or both, in the county where the government agency is located. Any damages awarded in a cause of action brought under this Act shall be assessed against the specific government agency and specifically assessed against its budget. Court costs shall be awarded to any private enterprise prevailing under this section. A private enterprise shall not have standing to seek injunctive relief or damages or to challenge violations of this Act in the courts of

this state until the private enterprise has first made a complaint to the state auditor and has received the decision of the state auditor.

Section 8. {Severability clause.}

Section 9. {Repeals.}

Section 10. {Effective date.}

Adopted by ALEC's Tax and Fiscal Policy Task Force and

Approved by full ALEC Board of Directors January 1995.